

## Private and Public Protection: Civil Mental Health Legislation by Jacqueline M Atkinson

Published by Dunedin Academic Press (2006) £12.95

ISBN: 978-1903765616

This book is a timely reminder of the contrasting paths which determined the review and reform of legislation in the United Kingdom, concerning the care and treatment of individuals experiencing mental disorder. The Scottish experience concluded some time ago and we are already learning from this experience<sup>1</sup>, whilst the process concerning England and Wales has in comparison only recently been brought to some kind of conclusion. After bitter debate and considerable wrangling, the new *Mental Health Act 2007* received Royal Assent on the 19th July 2007, and most of its amendments to the *Mental Health Act 1983* are due to be implemented on 3rd November 2008, with other provisions (such as those amending the *Mental Capacity Act 2005*) coming into effect in 2009 or (in the case of age appropriate services) 2010. However, after the fierce and repeated attempts to introduce new legislation, this is arguably a fudged outcome, once again amending the existing legislation. The 2002 and 2004 draft bills for England and Wales were arguably ill-conceived and unworkable, but we are yet to discover whether the enacted legislative measure has provided the solution so many sought. Arguably, whilst it is often considered that our Scottish colleagues appear to have got it right first time around, as the author notes in her concluding remarks, only time will tell.

Professor Atkinson is a Chartered Psychologist who has demonstrated a meticulous attention to the field of mental health, particularly concerning advance decision-making<sup>2</sup> and variable aspects of related mental health policy and legislation. Combined with her experience as advisor to the Scottish Parliament Health and Community Care Committee when considering the Mental Health (Scotland) Bill in 2002, she is clearly well positioned to undertake this analysis.

This text is refreshingly accessible, yet detailed and well supported. The interface of research, contextual reference points and detail assists one in assimilating the salient arguments with relative ease. The primary focus of the work is the development and detail of the *Mental Health (Care and Treatment) (Scotland) Act 2003*, and the experience in England and Wales is drawn upon and acts as a contrast. The author acknowledges that the book is limited to only reviewing the civil aspects of the legislation and again only specific elements of this. Given the material which has been presented, a less restrictive vehicle would undoubtedly have facilitated a fascinating read.

In the opening chapter, *Review of Mental Health Legislation: A New Act for a New Century*, the author manages to summarise with accurate brevity contrasting cultures, practices and experiences which present the backdrop to the divergent paths taken each side of the border. The different approaches to managing potentially high profile situations and the reduced presence these have had in the Scottish media cycle as a result are described, along with the political developments which afforded Scotland flexibility and freedom to offer time to their own issues. Against this backdrop, the reform process is summarised, starting with the initial committees set up to review the respective existing legislation in

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1 Lawton-Smith, S. (2006) *Community-based Community Treatment Orders in Scotland: The Early Evidence*, London, Kings Fund

2 A review of her book 'Advance Directives in Mental Health: Theory, Practice and Ethics' (Jessica Kingsley) (2007) appears elsewhere in this issue of the *Journal of Mental Health Law*.

each jurisdiction, taking the reader through the suggested principles, and revisions to the definition of mental disorder. The limitations placed upon the Richardson Committee are stark when placed against the context of the approach taken by the then Scottish Minister for Health, Sam Galbraith. Although, in some ways these differences are a testament to the work of the Richardson Committee, given the similarities of the reports presented to the respective governments and the overall positive response they received from stakeholders (p.7).

As the book progresses, we are offered an understanding of the core framework for compulsory treatment under the Act, and of changes to detention criteria and focus, such as the inclusion of capacity criteria and the resultant complex problems inherent in the assessment of impaired decision making. Arguably however, the real focus of this section is the Community-Based Compulsory Treatment Orders (C-B CTO). Again, time is spent putting this issue into context, setting the provisions explored against a body of evidence which the author contributed to the development of. The historical and in some ways moral review of the C-B CTO argument helps us understand the presentation of the measure as included in the Scottish Act, but also acts as a reminder of the intense emotions this particular issue generates and how the history books will represent events in our past.

Whilst international research on C-B CTOs existed at the time of the reforms, as the author cautions, this was (and still is) limited and difficult to compare. The vital need for usable data to inform policy and legislative decisions at that time led to additional research being commissioned by the Department of Health in support of the proposals for England and Wales<sup>3</sup>. What is notable is that this was not published until the 7th March 2007, by which point the Bill had already proceeded through the House of Lords (including Committee and Report stages) and was available only for the later Commons debates<sup>4</sup>. This is despite requests from both houses for the release of the findings of the research in December 2006<sup>5</sup>, a failed request under the *Freedom of Information Act* 2000 by an opposition minister, and the subsequent repeated requests on the floor of the Commons on the 9th January 2007, including an unchallenged statement by Tim Loughton M.P. that he believed the report had been with the Department of Health since the autumn of 2006<sup>6</sup>. It is somewhat inevitable that when the report was finally published, its results were inconclusive. In essence, the authors stated that it was not possible to state whether C-B CTOs were harmful or beneficial to patients. This echoed extant work which questioned whether the legal measure, or the heightened service activity surrounding the person under the C-B CTO, led to any perceived benefits. However, it is the timing and circumstances surrounding the report's availability which will be something that observers will judge when contrasting how Scotland and England did things so differently.

The introduction of the Mental Health Tribunal system to Scotland is a clear development for Scotland in terms of ensuring greater patient's safeguards and a timely shift away from the sheriff court's role in determining compulsory treatment and hearing appeals. Once again, this is covered in clear detail, as far as the limitations of this volume allow. It would appear that many of the challenges that have faced the Tribunal system in England and Wales are to be faced in Scotland (e.g. insufficient numbers of medical members), and that these will need to be addressed fully to effectively deliver this service. The observed fight for dominance between the medical and legal professions (p.38) is unsurprising given the medico-legal battle which has itself dominated the history of mental health legislation. We have seen the

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3 Churchill, R. et al (2007) *International experiences of using Community Treatment Orders*, London, Institute of Psychiatry / Kings College London

4 Indeed this publication date neatly coincided with the Bill's 1st Reading in the Commons

5 HC 5th December 2006 cc377W-378W; HL 13th December 2006 WA210

6 HC 9th January 2007 cc131-132

pendulum swing throughout the course of mental health legislation reform, with the tension between these two approaches often being the deciding factor as to how the current administration would respond to what was normally a public outcry, or some similar external pressure. There have been repeated instances of expressed concern for those who may have been wrongfully incarcerated and various legal measures enacted to balance and rebalance the desire to keep the 'well' and the 'unwell' in their 'rightful' places. Sadly, this has pervaded into the risk-orientated driver which the author identifies has steered the most recent reform process south of the border, although she recognises that the risk agenda has caused concern within Scotland too.

Thankfully however, other patients' rights and safeguards have been a feature of the recent reform process in England and Wales, as this book demonstrates they were in Scotland. The successful introduction of advocacy services under the Scottish Act is considered, although at the time of writing it was still unclear what impact the use of advocacy would have on patients' involvement with services or how it will assist them with regard to the amended legal processes. With specific regard to advance decision making or arrangements for future decision-making, we are offered detailed coverage of both advance statements and the patient's representative. We are introduced to some of the broader historical, international and practical issues surrounding advance decision-making. However, with the mix of terminology referred to and the measures in the *Mental Capacity Act 2005*, one must not confuse *Advance Statements* under the *Mental Health (Care and Treatment) (Scotland) Act 2003*, with those in the capacity legislation south of the border – they have significantly different purposes. In saying that, a crucial issue is shared between the measures intended to facilitate advance refusal in both jurisdictions, that of capacity. The author explores the difficulties which will be faced when considering the validity of an advance decision, and a myriad of other issues which inevitably only time will resolve, on both sides of the border. This uncertainty is however countered by some very useful and indeed practical guidance on the use of advance statements (as per the Scottish Act).

The author's ability to summarise depth into a limited space is demonstrated in the introductory pages to the role and involvement of the patient's relative. Here we are offered a précis of the importance and impact of relatives (even if sometimes abusive), and the role of legislation in attempting to manage both the consequences of mental disorder and the people surrounding the person experiencing this. The development of the role of the relative is reviewed against the backdrop of case law, political and strategic agendas and cultural influences. Some of the glitches in the new *Named Person* role are identified, whilst the material issues are explored, including a potential difficulty for the Mental Health Officer to be sure who the current named person is<sup>7</sup>, and the challenge to balance the rights of the patient and the named person.

The last chapter covers a range of issues which have been given space previously, and some which have not, but here from the perspective of the interface between the legislation and mental health service delivery (e.g. age appropriate services for children, reciprocity and resource issues). The chapter is not exhaustive in this regard as not all of the implications are covered, but the introduction openly admits to this, citing the limitations of space as the primary culprit. Indeed, this seems to be a theme throughout this review. Whilst the book is deeply satisfying, it also leaves one wishing that there had been more space. The cogency of argument, the quality of research, the interplay between policy, case law and various stakeholder quotations are excellent, but is also a peek at a vision of what could have been.

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7 Largely because the patient has the right to change their mind without any requirement to complete a form, register their nomination or any revocation.

However, for a book which barely has 80 pages to convey its actual contents, a surprising breadth of information is levered into such a compact package. Whilst at times the information may not always be in the same place (for example, details of the discussion concerning C-B CTOs is spread between chapter 2 and from a different angle, the final chapter 6), it is generally nonetheless there. Although, because of the size of the work, some material which would have made a useful contribution to the debate is absent (e.g. further discussion regarding some of the problematic issues with the legislation or Codes of Practice<sup>8</sup>). However, as concerns go, this is very much being picky, with regard to a book which is overall extremely well-researched, balanced and presented.

This text will undoubtedly be of interest to those who work within or have an interest in mental health, social care, social policy and of course the law. Equally so, as the focus of the book is set against the new political landscape in Scotland, a political scientist would find this an interesting read, particularly if their work ventured into health or law. It is a well-prepared piece of work which offers an insight into the development of Scottish mental health legislation. It would be interesting to see a follow on, after the passing of time has allowed the legislation to settle. Then perhaps the question of whether it was done right first time around can be answered with greater precision.

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8 See for example Patrick, H. *Mental Health, Incapacity and the Law in Scotland*, Tottel Publishing (2006) (reviewed in the November 2007 issue of the *Journal of Mental Health Law* @ pp 252-255)





